ESTES and others v. WILLIAMS and others.

(Circuit Court, S. D. New York. July 31, 1884.)

TRADE-MARK—FOREIGN PUBLISHER—AMERICAN ASSIGNEE—USE OF A NAME—RIGHT OF ACTION.

The publisher of "Chatterbox," in England, having assigned the exclusive right to use and protect that name in this country, the assignee may maintain his action against any other person who undertakes to publish books under that name in the United States.

In Equity.

J. L. S. Roberts, for orators.

Walter M. Rosebault and *Roger Foster*, for defendants.

WHEELER, J. Mr. James Johnston, of London, England, appears to have published a regular series of juvenile books of uniform appearance, and in a style of peculiar attractiveness, and called them the Chatterbox, until they have become widely known and quite popular by that name, in that country and this. He assigned the exclusive right to use and protect that name in this country to the orators for 10 years from January 1, 1880. The defendants have since that time commenced the publication of a series of books, and called them by that name, and made them so similar in appearance and style to those of Johnston as to lead purchasers to think they are the same. As a matter of fact it is found that they intended to make the books appear to be the same, and to avail themselves of the popularity which the books had attained by the labor and skill bestowed upon them by and at the expense of Johnston. There being no copyright to prevent, the defendants claim the right to so print and publish the series of books in this country, and that if they have not the right, the orators have no right to prevent them. There is no question but that the defendants have the right to reprint the compositions and illustrations contained in these books, including the titles of the several pieces and pictures. *Jollie* v. *Jaques*, 1 Blatchf. 618. That does not settle the question as to the right claimed here. There is work in these publications aside from the ideas and conceptions. Johnston was not the writer of the articles nor the designer of the pictures composing the books, but he brought them out in this form. The name indicates this work. The defendant, by putting this name to their work in bringing out the same style of book, indicate that their work is his. This renders his work less remunerative, and while continued is a continuing injury which it is the peculiar province of a court of equity to prevent. These principles are discussed, settled, and applied in *McLean* v. *Fleming*, 96 U. S. 245.

It has been argued that there have been various publications from earlier times by the same name, so that no new right to the use of that name could be acquired. This would be true, doubtless, as to all such publications as those to which the name was applied, but not as

to those essentially different. The fact of these other publications bears only upon the question of fact as to whether Johnston's work had come to be known by this name, and the defendants by using the name represent that their work is the same. The conclusion stated as to the fact has been reached after consideration of what is shown as to these other publications.

Johnston had the exclusive right to put his own work, as his own, upon the markets of the world. No one else had the right to represent that other work was his. Not the right to prevent the copying of his, and putting the work upon the markets, but the right to be free from untrue representations that this other work was his when put upon the markets. This gives him nothing but the fair enjoyment of the just reputation of his own work, which fully belongs to him. It deprives others of nothing that belongs to them.

The question then arises whether Johnston could transfer his right, or any part of it, to the orators, so that the defendants, in what they have done and are about to do, trespass upon the orator's rights, and not upon Johnston's. He could not do all this himself; he must act by and through others. No reason is apparent why he could not give them the exclusive right to put his work on the market as his, as he had that right. This seems to be what he undertook to do. They had that right, and the profits of its enjoyment would belong to them. The defendants would deprive them, and not Johnston, of the profits. The injury would be to them and not to him, and they are, in this view, entitled to the remedy.

It is objected that they also trespassed upon Johnston's rights before they acquired them. This may be true, and, if so, they may be liable for the damages. Such a trespass would not prevent them from acquiring a lawful right in a lawful manner. Had such trespasses been so frequent and long-continued that the work had come to be known to be the work of others, or had lost identification as the work of Johnston, the course of the defendants might not amount to any representations that their work was his; but the evidence does not show this. As the case is now understood the orators appear to be entitled to relief.

Let there be a decree for an injunction and an account.

THE SENATOR.

(District Court, N. D. Ohio. November 4, 1876.)

PROCEEDINGS IN REM—STEVEDORE SERVICE.

The services of a stevedore are necessary to the general business of the transportation of the cargo, and contribute to the rewards of capital employed in maritime service. They should be regarded as maritime service, and the stevedore furnished with a remedy against the vessel.

In Admiralty.

H. D. Goulder and *F. Kelly,* for libelant.

WELKER, J. The libelant made a contract with the master of the vessel to perform service as a stevedore, to unload her cargo at the port of Cleveland. Having performed the service, and not having received his pay therefor, he proceeds *in rem* against the vessel for his wages.

The only questions made in this case are, whether the service was a maritime one, and whether a lien therefor attached upon the vessel. Stevedores are a class of laborers at the ports, whose business it is to load and unload vessels; and by long practice they become experts at the business. Like the occupation of a sailor, it requires practice as well as judgment to insure the faithful and profitable discharge of the duty. The safety of the vessel, as well as the cargo, depends very largely upon the manner in which it is loaded,—how the cargo is stored; whether secured so that one part of it does not injure another, or that storms do not break it loose, or shift and thereby damage it; and whether the vessel is trim or well-balanced for navigation. The necessity for skilled labor has created the demand for this separate class of laborers, and induced men to adopt it as an occupation. They have, in the large expansion of the business of transportation upon our lakes and rivers, become a necessity in every port. The demand for such service cannot be fulfilled by the common laborer; hence they have become so connected with navigation, to load as well as unload vessels, that they are regarded as a part of the maritime machinery for the commerce of the lakes. They perform an indispensable part of the transportation and delivery of a cargo,—to begin it and conclude it. If services intermediate are regarded as maritime, why not the commencing and closing service? The libelant in this case having been employed by the master of the vessel to unload the cargo, and the contract being one within the scope of his authority as such master, it would seem that the service would come within the rule referred to by Judge EMMONS in *The Williams,* (1 Brown, 208,) in which he quotes and adopts the language of Judge WARE in *The Paragon:* "Every contract of the master within the scope of his authority binds the vessel, and gives the creditor a lien for his security." In the same case Judge EM-

MONS also says: "All maritime contracts made within the scope of the master's authority do, *per se*, hypothecate the ship."

I am aware that there are decisions opposed to the right to proceed *in rem* for this class of service; but they do not seem to be founded on sound principle, and I do not feel it to be my duty to follow them. There does not seem to be any difference in principle between that service and the service performed by the sailor, the lighterman, the man who sets the rigging, who scrapes the bottom or paints the side of the vessel, or by him who furnishes supplies, or tows the vessel out or into the port. They are all necessary to the general business of the transportation of the cargo, and contribute to the reward of capital employed in maritime service, and alike should be regarded as maritime service, and furnish a remedy against the vessel.

Decree for libelant.

See *The Bernard*, 2 FED. REP. 712; *The Windermere*, Id. 722, 727; *The Canada*, 7 FED. REP. 119; and *Hubbard* v. *Roach*, 2 FED. REP. 394.—[ED.

HAZARD and others *v.* ROBINSON and others.

(Circuit Court, D. Rhode Island. August 4, 1884.)

1. FEDERAL COURT—STATE COURT—REMOVAL OF CASE—FORMAL COMPLAINANTS.
When a party complainant to a bill in chancery has been made so, not with a view to obtain any decree in his favor, but solely for the purpose of securing the rights of other individual complainants, his being a resident of a state other than that in which the defendant resides is no cause for removal.
2. FEDERAL COURT—STATE COURT—REMOVAL OF CASE—FROM WHAT DETERMINED.
The question whether there is a separate controversy warranting a removal to the United States circuit court must be determined by the state of the pleadings and record of the case at the time of filing the petition for removal, and not by the allegations of that petition.

Motion to Remand Cause.

Amasee M. Eaton and *Josiah Porter*, for complainants.

Edward H. Hazard, Chas. H. Parkhurst, Elisha C. Clarke, Benj. Case, and *Francis C. Nye*, for respondents.

Before GRAY and COLT, JJ.

GRAY, Justice. This is a motion by the complainants to remand to the supreme court of the state of Rhode Island a suit in equity removed into this court upon the petition of James A Robinson, one of the defendants, under the act of congress of March 3, 1875, *c.* 137, § 2.

The question now before us is not whether the bill can be maintained, but whether the case should be tried in this court or the state court. The only difficulty in deciding this question arises from the clumsy and inartificial frame of the bill. So much of the bill as is material to the understanding and determination of this question is as follows: It begins by stating that it is brought by the widow and heirs at law of Jonathan N. Hazard, (some of whom are citizens of Rhode Island and the others citizens of New York, and one of whom, John C. Hazard, is described as suing "in his own right, or as trustee, or however otherwise,") and by the Narragansett Pier Company, (a corporation created in 1836 by a statute of Rhode Island,) against Attmore Robinson and Benjamin F. Robinson, citizens of Rhode Island, James A. Robinson, a citizen of New York, and others, whom it is unnecessary to enumerate. It alleges that Jonathan N. Hazard died intestate in 1878, leaving no debts, and therefore no letters of administration have been taken out on his estate; that his widow and heirs are the legal owners of the property, real and personal, forming his estate; that he owned an undivided half of the property belonging to the Narragansett Pier Company, and half of the shares in its capital stock; and that the defendant Attmore Robinson owned the other half of such property and stock. It alleges that the complainants are not informed whether any legal organization of the company was ever effected under its charter; that there have been